Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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JOHN H. PARSA,

*Petitioner,*

v.

JAMES C. WHITE, JR., individually and in his official capacity as the Director of the Finance Department of The State of Alabama; and HALYCON V. BALLARD, in her official capacity as the Director of the Personnel Department of the State of Alabama,

*Respondents.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a mid-management, merit system career employee in state service can be denied a job benefit based upon his political persuasions or associations without a showing by the hiring authority that political affiliation is a necessary requirement for the effective performance of the position involved?

2. Whether a public hiring authority can establish more than a mere pretextural legitimate nondiscriminatory reason for actions that could otherwise be discriminatory under Title VII, the ADEA, or the Equal Protection Clause where the actions were taken solely due to the political affiliation of the affected employee and where political affiliation was not shown to have been an appropriate requirement for the effective performance of the position involved?

3. Whether the Defendant White is entitled to the defense of qualified immunity despite the law being long established that is unconstitutional to deprive a public employee of a position because of his political affiliation or persuasion where political affiliation is not shown to be an appropriate requirement for the effective performance of the job in question.

4. Whether the mixed motive theory of the Civil Rights Act of 1991 applies in this case where there is direct evidence of discrimination?

## PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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### REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 8, 1995 (App. 1a) and the order denying rehearing and rehearing en banc was entered on October 11, 1995 (App. 27a). Unpublished decisions of the United

States District Court for the M.D. of Alabama were entered on August 22, 1994 (App. 2a) and September 9, 1994 (App. 26a).

## CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated August 8, 1994 (App. 1a), and that Court denied rehearing and rehearing en banc on October 11, 1995 (App. 27a).

The statutory provision conferring jurisdiction upon this court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court".

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1981. *Equal rights under the law.*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evi-

ence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2(a). *Unlawful employment practices.*

It shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(m).

Except as otherwise provided in this title [42 USCS §§ 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 6102. *Prohibition of discrimination.*

Pursuant to regulations prescribed under section 304 [42 USCS 6103], and except as provided by section 304(b) [42 USCS § 6103(b)] and section 304(c) [42 USCS § 6103(c)], no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Alabama Code § 36-26-2(14). *Provisional appointment.*

An appointment made for a period of not more than 156 work days to fill a competitive position pending the establishment of an employment register for the classification.

Alabama Code § 36-26-17. *Manner of filing of vacancies in classified service generally; appointments in classified service generally.*

Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion.

Whenever a vacancy is to be filled by appointment, the appointing authority shall submit to the director a statement of the title of the position and, if requested by the director to do so, the duties of the position and desirable qualifications of the person to be appointed and a request that the director certify to him the names of persons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the name of the 10 ranking eligibles from the most appropriate register and, if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy or all the names on the register if there are fewer than 10. Except that in the appointment of attorneys or legal research aides under this section by the attorney general for appointment in the office of the attorney general the director shall certify to the attorney general the names of all eligibles who meet the minimum qualifications for the particular class of attorneys. The attorney general may then appoint any person on the register of eligibles without regard to position on that register. If it should prove to the director that any person is not willing to accept the position, the appointing authority may request that additional names be certified until 10 persons eligible and available for appointment have been certified. Within 10 days after such names are certified, the appointing authority shall appoint one of

those whose names are certified to each vacancy which he is to fill; except, that, in the event that he has fewer than the authorized number of persons from which to make his selection, he may choose from the remaining certified names or if he has fewer than three persons from which to make his selection he may make a provisional appointment as provided by section 36-26-18. In the event that there does not exist an employment register which the director deems to be appropriate for the class in which the position is established, he shall prepare such a register within a reasonable time after receipt of the request of the appointing authority that eligibles be certified. Whenever an eligible has been certified to and rejected by appointing authorities three times, the director may remove the name of such person from the employment register.

Alabama Code § 36-26-18(e). *Extraordinary appointments.*

Whenever it is impossible to certify eligible persons for appointment to a vacancy in the classified service, the appointing authority may nominate a person to the director. If such nominee is found by the director to have had experience and training which appear to qualify him for the position, the director may authorize the appointment of such person to such vacancy only until an appropriate eligible register can be established and appointment made therefrom. In no event shall a provisional appointment be continued for more than 156 workdays. Successive provisional appointments of the same person shall not be made.

Alabama Code § 41-4-220. *Created.*

There shall be in the department of finance a division of data systems management.

Alabama Code § 41-4-222. *Director.*

The division of data systems management shall be headed by and under the direction, supervision and con-

trol of an officer who shall be designated as director of such division, to be appointed by the director of finance with the approval of the governor.

## STATEMENT OF THE CASE

### A. Course of Procedings and Dispositions in the Court Below.

John H. Parsa initiated this action on November 8, 1993 by filing a complaint alleging that his removal from a provisional appointment in the service of the State of Alabama constituted discrimination against him because of his age, race (Caucasian), color (white), sex (male), and national origin (Iranian). R1-1. He named as Defendants James C. White, Sr., individually and as Director of the Finance Department of the State of Alabama, and Halycon C. Ballard, in her official capacity as Director of the Personnel Department of the State of Alabama.

After securing a right-to-sue letter from the EEOC, Parsa amended his complaint to include claims under Title VII of the Civil Rights Act of 1964 ("Title VII"). R1-23.

On March 8, 1994, the Trial Court entered rulings eliminating some of the claims. R1-15. The individual capacity claims against White that were based upon 42 U.S.C. § 1981 and the equal protection clause remained viable, as did the ADEA claim against him in his official capacity. R1-15-9.

As a result of information received upon discovery, Parsa filed a motion to add a contention to the pretrial order to the effect that White had punished him for his perceived political loyalty in violation of his First Amendment right to freedom of association. R1-41. On August 22, 1994, an order was entered granting summary judgment in favor of the Defendants upon all of the claims (R2-48), and the order was accompanied by a memorandum opinion. R2-47.

The Plaintiff Parsa filed a timely motion under Rule 52(a) and Rule 52(b) to alter or amend the judgment

and/or findings (R2-49), which was denied by the trial court on September 9, 1994. R2-50.

On September 16, 1994, Parsa filed a notice of appeal to the Eleventh Circuit Court of Appeals. On August 8, 1995, a panel of that Court affirmed the trial court decision, per curiam, without opinion.

Subsequently, on August 28, 1995 Parsa filed a suggestion of rehearing En Banc and Petition for Panel Rehearing. On October 11, 1995 the request for rehearing was denied.

**B. Statement of the Facts.***

The Petitioner, John H. Parsa, is a white caucasian male of Iranian origin, who was 49 years of age at the time the facts in this case unfolded. Parsa first employment with the Alabama State Finance Department was in July of 1990, when he was selected to be assistant director of the Department's Data Systems Management Division (DSMD).

On August 27, 1992, at the same time he requested that Parsa be provisionally appointed as DSMD Director, Hunt's Acting Finance director, James Rowell, also requested the State Personnel Department to create a promotional register to be used in making the appointment to the position of DSMD Director. The Personnel Department ultimately created—and the DSMD Director position was ultimately filled—from an open competitive register. An open competitive register can include applicants who are not presently state employees as well as existing employees eligible for promotion.

The Data Systems Management Division was developed to coordinate all computer networking in the state government. *See* Ala. Code § 41-4-220 (1975). The Finance

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*** This statement of the facts is largely drawn from the trial court's order and, in many instances, is substantially copied therefrom, but not placed in quotation marks. The trial court's version is in its memorandum opinion at App. ——. When the Appellant adds facts not alluded to by the trial court, the approriate references to the record are being made.**

Director's appointment of the DSMD Director is required to be approved by the Governor. Ala. Code § 41-4-222 (1975).

The required range of knowledge and abilities specified for the position included knowledge of information systems, management principles, Alabama state government, the legislative process, information sources, and state laws, and candidates were required to have the ability to respond quickly, to communicate well and to comprehend policies. Parsa was provisionally appointed as DSMD Director. By statute, a provisional appointment may not exceed 156 working days. (Ala. Code §§§ 36-26-2[14], 36-26-18[e] [1975]), and can be canceled at any time, there being no legal requirement that a provisional appointment be made permanent. Witnesses agreed, however, that there existed a long-standing practice of making provisional appointees permanent if they were reachable on the register. R1-33-3 and Exhibits O and P to original appeal. Sixteen applicants were accepted by the Personnel Department as qualified for the position of DSMD Director on an open competitive basis. Among these applicants were: plaintiff Parsa; Roderick Benton, then a fifty-nine-year-old white male, who had twice served as assistant director of DSMD and was Parsa's immediate predecessor as acting director of DSMD; and Jacquelyn Patillo, a then thirty-three-year-old black female.

On April 22, 1993, Governor Hunt was convicted of felony ethics charges and stepped down as Governor, and Lt. Governor Folsom was sworn in as Governor. On or about April 27, 1993, Mr. White was appointed Finance Director. The same day, newly-appointed Finance Director White (who is black) received a letter from Charlie D. Waldrep (who is white), as the chief of new Governor Folsom's transition team. Waldrep requested the immediate cancellation of the provisional appointment of Parsa as Director of DSMD, and the transfer from Parsa of all of the electronic security system. Waldrep testified that former Governor Hunt's outgoing chief of staff had ex-

pressed the opinion to Waldrep that Parsa may not serve the new Folsom Administration well because of his friendship to Governor Hunt's son and his loyalty to the Hunt administration.

By letter dated July 10, 1993, Finance Director White canceled Parsa's provisional appointment. The trial court noted a strong disagreement between Folsom's initial transition chief Waldrep and his transition director, John Tanner, as to whether Parsa should be appointed as DSMD Director. R2-47-18. Tanner was characterized by the court as an "avid champion of Parsa's candidacy." R2-47-18.

Waldrep's opposition to Parsa was not based upon any defect in Parsa's character or upon any suspicion that he had or would in any way misuse the state's computer system or security system but was centered *solely* upon Waldrep's being told that Parsa had been loyal to Governor Hunt and to Hunt's son, Keith. R2-44-exhibit 1, Waldrep Deposition, pp. 19, 21-22, 27, 31-32 (in separate envelope). In fact, the security system was not a primary responsibility of the DSMD Director, and was later removed from among the ancillary duties of that position. R2-49-attachment, p. 4. Although White testified that Waldrep had told him that the security system under Parsa had "some serious problems" and that it was being used to "spy on people and all sorts of things." Waldrep recalled no such conversation. R2-39; R2-44, attachment of Waldrep deposition excerpt, p. 53.

According to the testimony of Governor Folsom, if White had recommended Parsa as DSMD Director, the Governor would have approved Dr. Parsa's selection. Folsom would have appointed Parsa even if Folsom had been advised that Parsa had been loyal to Hunt. R2-39; R2-44, Folsom Deposition, pp. 18-19, 20-21, 28-30.

On June 14, 1993, Defendant Ballard certified the ten applicants with the highest scores and issued a certification of eligibles for the DSMD Director position. On

that list, Parsa was listed first; Benton, third; and Patillo, tenth.

In making his selection for DSMD Director, White claimed he studied in detail the applications of Rod Benton and Patillo only, and interviewed only those two applicants. Rowell, as the outgoing acting Finance Director in the Hunt Administration, recommended Parsa for the position. *According to White, he did not even consider Parsa for the position because of Waldrep's opposition to Parsa's appointment.*

White claimed he first offered DSMD Director position to Rod Benton, but that Benton suggested that a younger person be hired. If indeed this offer was made to Benton, Parsa contends that it was no more than a ruse, since it was general knowledge that Benton would not accept the position. R1-33-6, exhibit O, p. 149; R2-49-12, 13. White claims that he appointed Patillo to the position of DSMD Director as his second choice. Parsa returned to his position as assistant DSMD Director, a position that he continues to occupy.

There was considerable evidence that Parsa was eminently qualified for the DSMD Directorship, and that although Patillo placed tenth on the certificate of eligibles, *she was, in fact, not qualified for the position,* and that White was made aware of Patillo's lack of qualifications on several occasions. R1-33-14 and supporting exhibit O in separate envelope; R2-44-13 (exhibit 1 in separate envelope). This opinion was given to White on several occasions by Rowell, who had served as subject-matter expert on DSMD Director qualifications. R1-33-14, exhibit D (in separate envelope). In certifying Patillo, certain graduate courses were allowed to be substituted for part of a six-year experience factor, contrary to the DSMD Director job announcement. R1-33-4, exhibits R, pp. 20, 25-26, 31-33 and T, pp. 62-64 (in separate envelope). There was also evidence that White made a comment about "social justice" to Rowell in con-

nection with his decision to hire a lower-ranked black over a higher-ranked white. R1-33-9, exhibit O, pp. 86-87.

The evidence showed a significant propensity of White to prefer the appointment of blacks over whites. Illustrations of this propensity are enumerated at R1-33-9 through 12; R1-33-12.

White testified that the resistance of the Folsom transition chief was only "*part of*" the reasons why he did not consider Parsa for the job. R1-33-5. (Emphasis added).

## REASONS FOR GRANTING THE PETITION

### I. INTRODUCTION AND ISOLATION OF CENTRAL ISSUE.

As this case wound its way through the pretrial stages, it appeared to a routine Title VII—ADEA—Equal Protection case. As the trial court held, the Plaintiff established the requisite prima facie case for a Title VII claim under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and for an ADEA claim under *Clark v. Coats and Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1990).

It appeared Defendant White's "legitimate, nondiscriminatory" defense would be that Patillo was the more logical choice in spite of Parsa's superior qualifications, because Patillo's "philosophy" was more akin to White's than was that of Parsa, and/or because White wanted someone to fill the position who had not been on the state government scene. R1-33-7. In the case's later stages, however, the issue arose that has been characterized by the trial judge as the "core legal question": *whether the opposition to Parsa that was expressed by the Governor's transition chief completely justified White's refusal to consider Parsa for the job.*

This "core legal question" presents itself in at least three ways: (a) As to the Title VII, ADEA, and Equal

Protection claims, the transition chief's disenchantment with Parsa is used by White as his "legitimate, nondiscriminatory" explanation as to why he rejected Parsa; (b) Parsa claims White's reliance on the transition chief's advice violated his First Amendment right to political freedom and to the freedom of association; and (c) The transition chief's disenchantment with Parsa is used by White in his individual capacity to establish qualified immunity defense.

The new "core legal question" also invokes the mixed-motive theory of the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(m) (Supp. IV 1992), repudiating the rule of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

## II. WHITE'S ASSERTED LEGITIMATE NONDISCRIMINATORY REASON WAS A PRETEXT.

As the trial court correctly noted, establishment by an employee of a prima facie case shifts the burden to the employer to produce evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 125 L.Ed. 2d 407, 113 S.Ct. 2742 (1993). If an employer meets this burden, the employee responds by demonstrating the proffered reasons are pretextual and by persuading the fact finder that the employer's discrimination was intentional, but intentional discrimination may be inferred by the fact finder if a pretext is established. *Id.; Batey v. Stone*, 24 F.3d 1330, 1334, 1335 (11th Cir. 1994).

In the case at bar, White (and Waldrep) elected to rely upon the fact that Parsa was loyal to a governor other than Folsom as a reason for rejecting his candidacy, but their testimony is in sharp conflict. R-2-44-Exhibit 1 Waldrep Deposition pp. 19, 20, 21, 22, 17, 31, 32 (in separate envelope); R2-39-4. Courts have long held that a governmental official "may not deny a benefit to a person on a basis that infringes his constitutionally-

protected interests,"—and in particular the rights to free speech and associations. *See Perry v. Sindermann*, 40 U.S. 593, 597 (1972).

The *Perry* principle is tempered by the "balancing test" espoused in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in cases of the speech and associations of public employees. *Connick v. Myers*, 461 U.S. 138 (1983); *Bates v. Hunt*, 3 F.3d 374 (1993); *McDaniel v. Woodard*, 886 F.2d 311 (11th Cir. 1989); *Abbott v. Thetford*, 534 F.2d 1101 (5th Cir. 1976). There has been *no showing* here that Parsa's appointment would have disrupted anything.

The directorship of DSMD, although a position of significant importance, is not one standing in a close or confidential relationship to White or to the Governor. The position is a "second-line" one, where Parsa reported to the Assistant Finance Director for Information Services, and rarely came into contact with the Finance Director or with the Governor of Alabama. R2-49-attachment, p. 2.

Because White failed to point to a position of confidence to justify his rejection of Parsa, the trial court turned to political patronage cases like *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to justify its decision. In so doing, at R2-47-24, it said, "[t]here can be no dispute that the Director of DSMD occupies a political policymaking position that is entrusted with maintaining the security of numerous confidential documents affecting every area of state government." After making that finding, the trial court held that this case is controlled by *Stegmaier v. Trammel*, 597 F.2d 1027 (5th Cir. 1979). *Trammel*, however, presented a totally different set of facts from the case at bar, with the introductory synopsis by the Former Fifth Circuit being totally descriptive:

> "We affirm, holding that *a public employee occupying a position of confidence, loyalty, and trust*

> by virtue of her status *as the single deputy and assistant to an elected official* may be discharged solely on the ground of political affiliation without infringing her constitutional rights.' ' (Emphasis added).

The distinction between the two cases is clear. John Parsa, or a career merit system employee, was far from being the single deputy and assistant of an elected official.

In patronage cases, the critical question is not whether the employment may be designated as a policymaking or confidential one, but "whether the hiring authority can demonstrate that [political] affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel,* 445 U.S. 507, 518 (1980).

In this case, White has not shown that political loyalty is an appropriate requirement for the DSMD directorship and has not proffered a legitimate, nondiscriminatory reason for his decision but that, to the extent he has, the reason is pretextual.

## III. PARSA'S FIRST AMENDMENT CLAIM.

Much of the previous argument could be restated in support of Parsa's claim of violation of his rights to expression and association, and those points are simply incorporated herein by reference.

In a patronage case, as in the case of other First Amendment claims, a court must determine whether an employee's political affiliation or beliefs was a substantial or motivating factor in the treatment he or she received. *See Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1976); *Parker v. Wallace,* 596 F.Supp. 739, 743 (M.D. Ala. 1984). That question is automatically answered in Parsa's favor through the direct and undenied admissions of White. The next question under *Mt. Healthy* standards is whether the employer can show that the same decision would have been reached if political affiliation had not played a role. *Id.* at 743.

White has made no effort to offer such proof, relying instead on the perceived propriety of his actions.

## IV. THE QUALIFIED IMMUNITY ISSUE.

White has raised the defense of qualified immunity, which would only shield him from individual liability for damages. See *Moore v. Morgan*, 922 F.2d 1553, 1556 (11th Cir. 1991). Since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the defense is limited to an objective standard. Once a defendant shows that his actions were within the scope of his discretionary authority, the plaintiff must show that the official's actions "violated clearly established constitutional law". *Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir. 1988) quoting *Zeigler v. Jackson*, 716 F.2d 847, 849) (11th Cir. 1983).

For several decades, the law has been clear that discrimination based upon race, age, political affiliation, and the exercise of free speech and association is prohibited. White has not been able to show that his actions here fall within any of the exceptions to such prohibition.

## V. THE "MIXED MOTIVE" ISSUE.

The trial court disposed of the "mixed motive" issue in this case by explaining, at R2-47-20, that the Civil Rights Act of 1991 (42 U.S.C. § 2000e-2[m]) provided that "an intervening legitimate race-neutral motive cannot absolve an employer of liability once discrimination has been shown to be a motivating factor in the employment decision." The court noted that the provision had been calculated to repudiate the rule of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which had adopted the *Mt. Healthy* order of proof methodology.

Citing *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1518 (11th Cir. 1990) (per curiam), the trial court observed that this mixed motive theory could not be applied in this Circuit unless the plaintiff produces

*direct* evidence of intentional discrimination. R2-47-21, n.9.

There was in this case direct evidence of discrimination. Rowell suggested to White that his selection of a black, who was at best marginally qualified, over a highly qualified white person might be looked upon as racially motivated, White used the term "social justice" when referring to his action. Ante, p. 13. As to direct evidence of age discrimination, White also testified that Benton had suggested to him that he hire a younger person than himself, and White did so. R2-47-22. The evidence that White (accompanied by Waldrep) was motivated by political considerations is overwhelmingly direct. Waldrep testified that the Folsom effort had been to retain only those persons who were "apolitical". (R1-33-34 [attached deposition of Waldrep, p. 31]).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order or judgment of the court below should be reversed and remanded to that court so that this case can proceed to trial.

Respectfully submitted,

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